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### Sources of Water III: Interstate Transfers

Clyde O. Martz

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**SOURCES OF WATER III: INTERSTATE TRANSFERS**

**Clyde O. Martz, Counsel**

**Davis, Graham & Stubbs  
Denver, Colorado**

**MOVING THE WEST'S WATER TO NEW USES: WINNERS AND LOSERS**

**Eleventh Annual Summer Program  
Fleming Law Building**

**Boulder, Colorado**

**June 6-8, 1990**

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### SOURCES OF WATER III: INTERSTATE TRANSFERS

This paper addresses the growing imbalance between water supply and demand on interstate rivers; a growing pressure to make unused water available to areas of need; the right of individual appropriators to respond to interstate demands; and opportunities for Upper Basin states on the Colorado River to protect future allocations by techniques that will facilitate Upper Basin Development.

#### Selected References

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#### I. MARKET PRESSURES ARE CERTAIN TO RESHAPE INTERSTATE WATER ALLOCATIONS AND TRANSFER RESTRICTIONS.

- A. Historic allocation of interstate waters on  
sovereignty criteria by equitable

apportionment or compacts are becoming strained where population growths and water demands on a river system do not conform to water allocation patterns.

B. The Colorado River experience is a classic illustration of the problem.

1. Interbasin allocations under the 1929 Compact contemplated comparable long-range development and demands in each basin.
2. Article III(a) of the compact consequently made an equal allocation of beneficial consumptive uses to each basin.
3. More than 60 years of post-compact development, disparity in basin growth and demands, miscalculations in aggregate supplies and potential further reductions in presently available supplies is straining the equal allocation concept.
  - a. As much as 2,250,000 acre-feet of the Upper Basin's equal annual allocation has not yet been put to beneficial use and as much as 1,000,000 acre-feet of allocated water is delivered annually at the



Lee Ferry measuring point in excess of the Lower Basin entitlement. (Upper Colorado River Commission Annual Reports)

- b. Lower Basin agricultural and municipal demands have absorbed substantially all releases of mainstem water from Lake Mead and Lake Powell under applicable operating criteria, encompassing all water not put to consumptive use in the Upper Basin or stored in mainstem reservoirs to meet progressive ten-year compact obligations.
- c. The Central Arizona Project was authorized by the Colorado River Basin Project Act of 1968 (43 U.S.C. § 1501) on an assumption that its water demands would be met in large part from Arizona's allocated share of surplus water from Upper Basin allocations. Current implementation of the Project is drawing, or will draw, upwards of 1,000,000 acre-feet annually from allocations to the

Metropolitan Water District, San Diego, and other beneficiaries under the California Seven Party Agreement. Selected Legal References, Upper Colorado River Commission (1965) at p. 353.

- d. The California Coastal Zone is developing a critical water shortage from (i) domestic uses that are expanding in excess of 100,000 acre-feet per year, (ii) replacement requirements for water drawn to the CAP Project, (iii) loss of historic deliveries the Owens Valley and from Mono Lake areas, and increasing barriers to peripheral canal deliveries of Northern Colorado water to meet the Lower California needs.
- 4. If projected impacts of the greenhouse effect materially reduce the already limited Upper Basin outflow by as much as another 1,000,000 acre-feet per year, the time will shortly come when further Upper Basin beneficial uses will be barred, the compact allocations will be challenged on grounds of mistake,

abandonment of Upper Basin uses, or unforeseeable changes in river flow conditions; and significant increases in Colorado River outfall will be captured by the Lower Basin on equitable apportionment principles.

5. Alternatively, the political impacts of unsatisfied municipal demands in the Coastal Zone of California may well lead to a Congressional override of the compact allocations and a reallocation of a substantial share of Colorado River water to Lower Basin beneficial consumptive uses.

6. With municipal and domestic prices for Lower Basin water now running in excess of \$200 per acre-foot and Upper Basin water values for irrigation and stock water uses ranging from \$4.00 to \$20.00 per acre-foot, market forces free of compact limitations will lead to water right transfers to the Lower Basin and a material reduction in short-term and long-term beneficial uses in the Upper Basin.

## II. LOWER BASIN NEEDS, THE PRESSURE OF MARKET FORCES AND LONG-TERM UPPER BASIN PROTECTION MAY BE MET

IDEALISTICALLY BY THE KIND OF BALANCING PROCESS  
THAT IS BEING EXPLORED ON THE COLORADO RIVER BY  
THE RESOURCE CONSERVATION GROUP AND OTHERS.

A. Factors supporting a free market or compact  
readjustment objective:

1. Water is a critical national resource,  
generated in regions of precipitation  
surpluses and demanded in regions of  
non-water-related economic growth.
2. Free market forces tend to allocate the  
supply to meet the most economic uses.
3. The value placed on water by free market  
forces encourages water conservation  
throughout the entire Basin and thereby  
increases supplies for more intensive  
uses.
4. Were water tied to market factors and  
released on a short-term basis from  
marginal agricultural dependent regions,  
sales and leases of compact allocations  
might generate as much or more income  
for the source basin than agricultural  
production yields and provides  
supplemental funding for long-term water  
development.

B. Factors supporting regional allocations of  
water independent of market forces.

1. A water surplus over present levels of beneficial consumptive use provide an important level of security for future growth, provide protection in drought cycles and encourage regional economic development.
  2. Recognized environmental and wildlife demands necessitate levels of non-consumptive use in areas of recreational potential; it is unreal to confine water allocations under III(a) of the Colorado River Compact to consumptive uses.
  3. Lands in areas of water origin are equitably entitled to the benefit of water availability by reason of the sovereign status of the source state and the equal allocation of mainstem flow between the basins by the terms of Article III(a) of the Colorado River Compact.
- C. Goals of market forces and basin of origin interest may all be achieved in substantial part by a cooperative program that makes water freely deliverable on short-term response to market forces but subject to a reservation of reasonable quantities of water

for long-term developments consistent with the compact allocations.

1. By confining transfers to leases or deliveries of water on contract, rather than a transfer of water rights, no change is made in allocations, and compact entitlements are reaffirmed in both basins.
2. Transfer proceedings are limited to an alternate point of diversion, a release of the water to the river at the lessor's point of diversion, and reinitiation of diversions on recall for consumptive use in the Upper Basin.
3. As the water right is not transferred (but only the use of water), a strong case can be made for avoiding restrictions of anti-export legislation, provided deliveries can be effected by the Bureau of Reclamation under its mainstem operating criteria.

D. Transfers of water available for beneficial consumptive use in the Upper Basin, covered by appropriations under state law, avoid the surplus water release characterization of Article III(e) of the Compact.

- E. Use of privatization procedures under contract with the State or appropriate river districts protect recall rights without an interstate agreement that might trigger compact procedures.
- F. A substantial part of the funds generated by a program that could sell uses of water valued at \$30 per acre-foot for \$200 per acre-foot, less customary privatization charges, would support construction of Upper Basin storage facilities, reworking of existing facilities presently under safety restraints, initiation of needed desalinization and other basin-wide water improvement programs for both basins and discharge defaults under many present federal reclamation projects.

III. AN EVALUATION OF POTENTIAL LEGAL RESTRAINTS PLACED  
ON INTERSTATE WATER TRANSFERS.

- A. Transfers of water under adjudicated rights not covered by compact provisions.
  - 1. Interstate transfers of such rights was firmly established in Sporhase v. Nebraska, 458 U.S. 941 (1982), as an article of commerce subject to interstate transfer protections under the commerce clause of the United States

Constitution. As such, a transfer may only be limited under the police power of the state if the water is needed at the source for protection of public health and welfare; such a limitation is wholly inoperative so long as

(i) surplus waters exist in a river system sufficient to meet local needs as they arise and (ii) a right of recall exists to return the water to the source area if ever needed for health and welfare at that point. See, City of El Paso v. Reynolds, 597 F. Supp. 694

(1987).

B. Waters claimed by a state, as property of the people under Article XVI, § 5 of the Colorado Constitution, Colorado Enabling Act authority, and Congressional ratification of the applicable compact.

1. Article XVI, § 5 provides: The water of every natural stream not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as



hereinafter provided. See also  
C.R.S. 37-92-102.

2. The only case to construe the constitutional provisions to create a right in the state, Stockman v. Leddy, 55 Colo. 24 (1912), was overruled in United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).
3. Wyatt v. Larimer & Weld Irrigation Co., 1 Colo. App. 480 (1892) rejected the argument that the ownership of water remains inalienable in the public, and held that the water right passes to the people by the first appropriation to a beneficial use. And such rights should be freely transferrable to the extent permitted, following appropriation, by applicable law. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) is properly confined to its facts, i.e., that the compact allocation to the state is binding on the appropriator.
4. In Cascade Town v. Empire Water and Power Co., 181 Fed. 1011 (D. Colo. 1910), all state waters are made

available for appropriation as private property rights.

5. The proprietary right of the United States acquired through water resources in the West by treaties of annexation, were not transferred to the states by enabling acts or any subsequent legislation; the interest of the state in any interstate stream stems only from an equitable appointment or compact allocation for the benefit of its citizens.
6. The Act of 1866 provided only that: whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes are vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. Note that this Act went no further than to recognize the authority of the states to prescribe methods for acquiring, and the characteristics of,

water rights; it made no grant of water rights to the state.

7. Where courts have affirmed the right of the state to preclude an interstate transfer of water, other than under police power criteria, it has been on the basis that the water right was appurtenant to the land under state riparian law and could not be transferred to other land in other states. See, e.g., Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908). Cf. City of Altus, Oklahoma v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966), aff'd per curiam, 385 U.S. 35. See also Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (prohibiting state restrictions on the shipment of natural gas outside the state to conserve waning supplies for West Virginia citizens.).
8. Where transfers of water are restricted by state law, as to state lands within the state as well as outside the state, as in the case of designated basin groundwaters, restrictions are enforceable for the protection of the aquifer and controlled development of

C. Waters covered by interstate compacts are allocated for initial appropriation under the laws of the state or states to which an allocation is made, but are thereafter freely transferrable as property rights and articles of commerce pursuant to the law of the individual state and the non-discriminatory provisions of the commerce clause of the Federal Constitution.

1. No court has held that a compact allocation goes beyond making a share of interstate stream water available for appropriation under the laws of the respective compacting states; compact allocation provisions are only relevant to cases where (i) allocated water is first appropriated for use outside the state, (ii) conditional water appropriations are perfected by uses outside the compacting states, or (iii) an allocation is proposed for a use other than one contemplated by the applicable compact.

2. Congressional ratification of compacts has been treated as an Act of Congress, for purpose of establishing federal court jurisdiction; it has never been held to make the United States a party to the compact or to preclude Congress from modifying compact allocations compatibly with any overriding public interest.
3. Compacts can provide that allocated waters will be charged to the state in which the water is consumptively used; such a provision could preclude enlargement of a compact share of water by interstate transfers of appropriations. Such limitations are only present under Colorado River documents pertaining to distribution of water in the Lower Basin within the Lower Basin allocation or to a distribution of water under the Upper Colorado River Compact with respect to the waters allocated to the Upper Basin.
4. In any event, any potential inconsistency is overridden by express compact provisions that make user rights under the Compact subject to the

provisions of state laws. (Colorado River Compact, Art. IV, § 3.)

IV. AN EVALUATION OF PRESUMED IMPEDIMENTS TO INTER-BASIN TRANSFERS ON THE COLORADO RIVER.

A. Limitations in state export statutes.

1. C.R.S. § 37-81-101(1)(b) provides:

. . . the General Assembly hereby declares that, for the purpose of conserving the scarce water resources of the state and to thereby insure the continuing health, welfare and safety of the citizens of this state, it is unlawful for any person . . . to divert, carry or transport by ditches, canals, pipes, conduits, natural streams, watercourses or other means, any of the water resources found in this state into any other state for use therein without first complying with this section and section 37-81-104.

The provision of this section, referred to in § 101(1)(b), is found in subsection (3) and provides as follows:

Prior to approving an application (for interstate water transfer), a state engineer, groundwater commissioner or water judge, as the case may be, must find that:

(1) The proposed use of water outside the state is expressly authorized by interstate compact or credited as a delivery to another state pursuant to section 37-81-103 or that the proposed use of water does not impair the ability of this state to comply with its obligations under any judicial decree or interstate compact . . .

2. The provision of section 104, requiring a payment of \$50 per acre-foot as a transfer charge on interstate deliveries, was found in an opinion of the Attorney General to be an unconstitutional restraint on commerce.
3. Section 103(1) imposes a collateral limitation that may be restricted by construction to cases where a compact credit under section 101 would be required for Colorado to meet its compact obligation to the Lower Basin.

That provision states:

For the purpose of evaluating an application made pursuant to section 37-81-101, no water . . . may be diverted or appropriated in Colorado for a use which contemplates or involves the transportation of such water into or through another state . . . unless the amount of water so diverted or appropriated and transported through or into such other state or states is credited as a delivery to such other state or states by Colorado of water to which such other state or states may be or claim to be entitled from such interstate source . . . .

4. Section 103 can be construed by its express terms to be limited to a case where the diversion or appropriation is made by users outside the State of Colorado for application to beneficial

uses outside the state. As the state allocation is clearly limited at a minimum to the right to appropriate for beneficial consumptive uses within the state, it remains compatible with Section 101. Any other interpretation is believed to render it unconstitutional under Sporhase v. Nebraska and Texas v. New Mexico decisions.

5. In any event, these non-export provisions would not be a bar to interstate transfers so long as allocated water was available to this state in quantities sufficient to meet all of the state's demands for beneficial consumptive uses from the river system.
- B. Compact provisions allocating all water in the Colorado River system to beneficial consumptive uses for domestic and agriculture uses as defined in the Compact and precluding the withholding of water from inter-basin delivery that cannot reasonably be applied to such uses in the source basin.
1. Article III(e) of the Colorado River Compact prohibits the upper division



from withholding water which cannot reasonably be applied to domestic and agriculture uses.

2. Article VIII protects present perfected rights and provides that all other rights to beneficial use of water in the Colorado River system "shall be satisfied solely from the water apportioned to the basin in which they are situated."
3. Article IV limits uses for navigation and power generation and provides that "the provisions of this Article shall not apply to or interfere with the regulation and control by any state within its boundaries of the appropriation, use and distribution of water.
4. The claim made from these provisions is that any beneficial use transferred from one basin to the other basin will be charged to the allocation of beneficial consumptive use of the receiving basin. The consequence would be that, by agreement, the states would have precluded all transfers of vested

appropriative rights from one basin to the other.

5. The response is three-fold. First of all, the compact is making water allocations to the states for appropriation by the residents of each state in accordance with state law. Secondly, no changes in those allocations can be made by appropriations of residents of one basin of sources of supply in another basin for storage and delivery for initial beneficial uses in the receiving basin. Finally, a compact precludes withholding water in storage for a generation of power whenever such water is needed for agricultural and domestic uses in the other basin within or outside the allocations made by the compact. Nothing in the compact expressly or by implication precludes the transfer of private water rights that have vested under applicable state laws. Nothing in the compact precludes the application of the commerce clause to transfers of vested rights in interstate commerce where the rights are freely

transferrable within the source state and where the transfer does not in any way preclude the source state from meeting its delivery obligations under Article III(d) of the Compact.

Moreover, when allocated water has been appropriated it becomes water that can reasonably be applied to domestic and agriculture uses within the language of Article III(e) and can be withheld or transferred in accordance with the law of the state in which the appropriation is made. The compact provisions only mean that water supplies covered by lease agreements must be appropriated water freely transferrable under state law.

C. Regarding restrictions contained in documents characterized as the Law of the River.

1. Boulder Canyon Project Act, 43 U.S.C. § 617(c) (1928) establishing an allocation between Arizona, Nevada, and California to the 7.5 million acre-feet annually apportioned to the Lower Basin by the compact plus a division between Arizona and California "of the excess or surplus waters unapportioned by the

Colorado River Compact;" and § 617(e) limiting storage in river reservoirs to river regulation, improvement of navigation, irrigation and domestic uses pursuant to Article VIII of the Colorado River Compact and, finally, for power.

- a. It is contended that these provisions allocate all mainstem water in the Colorado River below Lee Ferry, regardless of its source, and limit deliveries to contracts made to implement the provisions of the Act.
- b. The response is that the Act is only addressing waters allocated to the Lower Basin by compact provisions and to surplus water in the river not allocated by the provisions of the compact itself. Although in practice the latter has been employed to divide the water of the Upper Basin that is not being consumed in that basin, such water is not "surplus" water within the meaning of Article III(f) and (g) of the Compact and, in any event, does not encompass water

available for reasonable beneficial use in the Upper Basin and transferred by lease or contract for Lower Basin use independent of compact allocations.

2. California Self-Limitation Act and Seven Party Agreement, each containing language defining and limiting uses of California and agencies within California to the waters allocated to the Lower Basin or waters surplus and unapportioned by the compact. Neither in language nor context do such provisions purport to apply to waters allocated to the Upper Basin, available for beneficial use in that basin and transferred to Lower Basin uses pursuant to provisions of state law.
3. The decree in Arizona v. California, 376 U.S. 740 (1964).
  - a. The decree makes allocations among the Lower Basin states and contains a number of provisions relating to the administration of mainstem flows. For instance, paragraph I.B.(4) provides that "any mainstream water consumptively

used within a state shall be charged to its apportionment, regardless of the purpose for which it was released." Section I.B(b) provides that "mainstem water shall be released or delivered to water users . . . in Arizona, California and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute. The decree further enjoins the three states and various California water users from consuming or purporting to authorize the consumptive use of water from the mainstream in excess of quantities permitted under Article II of this decree.

- b. The contention is that this decree, by its express terms, establishes a management regime on the river that precludes any mainstream water deliveries without chargeability pursuant to the Boulder Canyon

Project Act or contractual arrangements prescribed for mainstem water delivery.

- c. The response is that the Arizona v. California case was limited in scope to management of compact deliveries throughout the Lower Basin and does not contain either express or implied language that would preclude delivery for beneficial use in any of the Lower Basin states of water apportioned to the Upper Basin, appropriated under the laws of Upper Basin states and transferred for beneficial use to the Lower Basin pursuant to transfer procedures approved by such laws.

4. The Colorado River Storage Project Act of 1956.

- a. This Act authorized construction, under federal financing programs, of various mainstem reservoirs and participating projects for the stated purpose of regulating the flow of the Colorado River and making it possible for the states

in the Upper Basin to utilize the apportionments made to and among them by the Colorado River Compact; it further directed the Secretary to comply with the Law of the River documents for the storage and release of water from reservoirs in the Colorado River Basin.

Section 620(c) provides that "all units and participating projects shall be subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the states of the Upper Basin pursuant to the Colorado River Compact and the Upper Colorado River Basin Compact, respectively . . . ."

- b. It is contended that this Act impresses Congressional management on the storage and delivery of water throughout the mainstem system of the Colorado River and precludes transfers of any waters through the system without specific Congressional authorization.



c. This issue must be viewed in conjunction with the Colorado River Basin Project Act of 1968 authorizing the construction of the Central Arizona Project and further participating projects, and establishing a management program for the mainstream reservoirs. Section 602(a) directs the Secretary to "propose criteria for the long-range operation of the reservoirs constructed and operated under authority of the Colorado River Storage Project Act, the Boulder Canyon Project Act and the Boulder Canyon Project Adjustment Act. Section 203 of the Act expressly contemplates importations of water into the Colorado River system from sources outside the natural drainage area. In that context the Congress has dropped management provisions that could be construed to limit the operating criteria and mainstem reservoirs storage and contract delivery only of allocated Lower Basin Water.

V. IMPLEMENTATION OF LEASING PROGRAM WILL REQUIRE SELECTION OF WATER TRANSFERABLE UNDER STATE LAW UNDER BUREAU OF RECLAMATION OR RIVER DISTRICT PROSCRIPTIONS, ESTABLISHING A PROCEDURE CONSISTENT WITH THE BUREAU OF RECLAMATION POLICY OF DECEMBER, 1988 TO OPTIMIZE BENEFICIAL USE OF PROJECT AND OTHER WATERS BY FACILITATING THEIR TRANSFER TO POINTS OF NEED AND SATISFACTORY PURSUIT OF STATE PROCEEDINGS FOR QUANTIFYING WATERS TRANSFERRED OR EXCHANGED IN USE AND MEASURING EVAPORATION AND TRANSPORTATION LOSSES IN TRANSIT.

- A. These procedures are substantially similar to those employed in effecting changes in place and character of use of water within a state system, modified only in the call for interstate cooperation in the Upper Basin pursuant to the terms of the Upper Basin Compact and management of deliveries by the state engineers and Bureau of Reclamation personnel.
- B. The procedure is significantly simplified by a leasing arrangement through which the supplier only closes his headgate pursuant to administrative or judicial order and addresses state and federal measurement criteria between the point of diversion and the place for downstream delivery.

C. Recall is effected by notice and initiation of diversions at the old or altered diversion point in the Upper Basin.

VI. A PRIVATIZATION CONTRACTUAL ARRANGEMENT APPEARS TO BE THE PREFERRED COURSE TO IMPLEMENT AN INTER-BASIN TRANSFER PROGRAM IN THAT:

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- A. The states do not have the capacity to make or administer necessary delivery arrangements.
1. Any agreement the state might make with a Lower Basin state relating to recall of water or the preservation of Upper Basin allocations would have compact characteristics and might well require modification of the Colorado River Compact or approval of supplemental agreements by the Congress.
  2. If individual states got into competition with one another in the management and delivery of water, frictions would likely break down the viability of the whole program.
  3. If the Upper Basin states enter into a cooperative arrangement to make water available from each of the states to serve a Lower Basin need, a compact

relationship would likely arise and  
necessitate Congressional ratification.

- B. Lower Basin entities might proceed directly to gain leases on valid existing rights and arrange for the transfer of the water to Lower Basin use.
1. Any such entity would have to address each individual water transfer in a separate administrative or court proceeding, incur significant delay and cost of implementation and likely create political opposition within the source states.
  2. Most significantly, however, the acquisition of an Upper Basin right directly by a Lower Basin user, particularly if the right had not enjoyed a long-standing Upper Basin use, could well be construed as the acquisition of allocated Upper Basin water for Lower Basin use and incur a charge against the compact allocation to the Lower Basin.
- C. The privatization arrangement, with participation from each of the supplying states, can provide flexibility in generation of source water, facilitate cycling of

agricultural demands and make the program a cooperative basin-wide endeavor.

- D. Most importantly, such arrangement would seem to avoid challenges to the compacts and the compact allocations due to unforeseen changes in water development and demand and to a consensual arrangement to build an ongoing case against potential claims of abandonment of compact allocations.

Although we have focused on the Colorado River Basin as a live area for interstate and inter-basin programming, the need for supply-and-demand balance exists throughout the west; and precedents set from Colorado River Basin transfers are likely to guide similar programs on other river systems within the next decade. Change is on the threshold; it is incumbent upon the states and knowledgeable water counsellors (i) to shape a program that will permit critical market demands to be met compatibly with the protection of long-term allocations for future development in water-sufficient areas and (ii) to utilize a program of this kind to fund conservation and use programs with the market revenues that can be generated for that purpose.

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